IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB,

Petitioner,

v.

WALTER J. HICKEL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WILDERNESS SOCIETY, IZAAC WALTON LEAGUE OF AMERICA AND FRIENDS OF THE EARTH, AS AMICI CURIAE

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit (Pet. App. A, pp. 1-28) and the United States District Court for the Northern District of California (Pet. App. B, pp. 29-42) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970, and the petition for a writ of certiorari was filed on November 5, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a national conservation organization has standing to sue to prevent permanent damage to Sequoia National Game Refuge, Sequoia National Forest and Sequoia National Park under statutes intended to protect these areas.

2. Whether defendants may allow the construction of a large resort and a connecting highway and electric transmission line in Sequoia National Game Refuge, Sequoia National Forest and Sequoia National Park even though such uses are inconsistent with the purposes for which Congress reserved these federal lands. More specifically, whether defendants may:

Circumvent the 80-acre limitation on long-term permits for national forests (16 U.S.C. 497) by issuing supplemental permits for 13,000 acres which are not revokable either in fact or law;

Ignore a stature (16 U.S.C. 688) requiring that all use of Sequoia National Game Refuge be consistent with the purposes for which the refuge was established;

Authorize a major highway across Sequoia National Park for a non-park purpose despite requirements that the Park be conserved (16 U.S.C. 1, 43); and

Ignore a statute (16 U.S.C. 45(c)) requiring Congressional approval of any transmission line in Sequoia National Park.

INTEREST OF AMICI CURIAE

All three amici curiae are major, national conservation organizations with deep and well-established interests in protecting America's great scenic resources. They are

increasingly relying upon litigation as a principal means for carrying out their purposes.

The Wilderness Society is a nonprofit citizens' organization with approximately 80,000 members. It was organized in 1935 to obtain protection for the Nation's remaining wild lands, to carry on education programs concerning the wilderness, and to conserve our natural resources.

Friends of the Earth is a nonprofit organization with 8000 members and is dedicated to the preservation, restoration and rational use of the environment in the United States and throughout the world. It is particularly interested in preserving the world's natural ecosystems and remaining wild places.

The Isaac Walton League of America is a nonprofit organization with approximately 50,000 members. Its primary goal is restoring and maintaining the quality of the environment through the protection and wise use of our natural resources.

Both the petitioner and respondents have consented to the filing of this brief.

STATEMENT

The amici curiae adopt as their statement of the case the statement contained in the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With Two Court of Appeals' Decisions on an Important Issue of Standing

The Court of Appeals held that the plaintiff, the Sierra Club, did not have standing to sue pursuant to various federal statutes which restrict the authority of the Secretaries of Interior and Agriculture to permit use of national park, refuge, and forest land. The court recognized the standing of "local conservationist organizations made up of local

residents and users of the area affected by the administrative action" (Pet. App. 17). The court distinguished the Sierra Club on the ground that "there is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them" (Pet. App. 16).

The holding of the Court of Appeals for the Ninth Circuit is in square conflict with decisions of two other circuits and several district courts. The court below specifically rejected (Pet. App. 17, note 9) the holding in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (C.A. 2, 1970), that the national conservation organizations, and specifically the Sierra Club, have standing.[1] In contrast to the Ninth Circuit's holding, the Second Circuit explicitly upheld the Sierra Club's standing on the ground that the Club (425 F.2d at 102):

> made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them.

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[1] In its petition in this case the Sierra Club noted (p. 10) correctly the conflict between the decision of the court below and that of the Second Circuit in *Citizens Committee v. Volpe*. However, in its Brief in Opposition to Petitions for a Writ of Certiorari in *Citizens Committee v. Volpe*, Nos. 614 and 615, this Term, the Sierra Club said (p. 25) that the disagreement between circuits "is not material . . . to the Ninth Circuit's principal holding and constitutes no reason for review by this Court." In fact, the Ninth Circuit's decision is in direct conflict with one of the holdings by the Second Circuit—i.e., that national conservation organizations have standing to protect the environment—and therefore fully justifies review by this Court of the Ninth Circuit case. But since both the Second and Ninth Circuits agree that some of the plaintiffs in the Second Circuit case, the local conservation organizations, have standing, there is no basis for this Court to review the Second Circuit case on the issue of standing. For even if the Ninth Circuit is correct and national conservation organizations do not have standing, this will affect only one holding, not the decision, of the Second Circuit.

> Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic action, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are . . . serving as "private Attorney Generals" to protect the public interest.

Similarly, the decision below is in conflict with *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093, 1097 (C.A. D.C., 1970), where the Court held that national conservation organizations had standing to attack the continued marketing of DDT:

> [T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the adverseness required by Article III of the Constitution.

The national organizations whose standing was upheld included the Environmental Defense Fund, the Isaac Walton League, the National Audubon Society and the Sierra Club, the plaintiff in this case. Accord, *Environmental Defense Fund, Inc. v. HEW,* 428 F.2d 1083, 1085, note 2 (C.A. D.C., 1970). And several district courts have also upheld the standing of national conservation organizations. *Isaac Walton League v. St. Clair,* D. Minn., Civ. No. 5-69, decided June 1, 1970 (standing upheld because "the League has a long history of activity in conservation matters and natural resource preservation"); *Parker v. United States,* D. Colo., Civ. No. C-1368, decided December 24, 1969 (upholding, *inter alia,* the standing of the Sierra Club); *Wilderness Society v. Hickel,* D. D.C., Civ. No. 928-70, decided April 23, 1970.

It is possible that the issue of standing in this case could be overcome if this Court remanded the case to the district court to allow plaintiff the opportunity to amend its complaint. The Sierra Club has a national membership of 78,000 of whom 27,000 reside in the San Francisco area. Some of its members probably use the Mineral King Valley and the portion of Sequoia National Park affected by the proposed development.

However, the holding of the court below is of fundamental importance for the protection of the environment —possibly for this case but certainly in other cases. Environment cases increasingly raise issues which do not involve, or only incidentally involve, direct users: The protection of wilderness areas, the preservation of wildlife refuges, the survival of rare and endangered species, the integrity of natural rivers, and the natural or scenic aspect of landscape. Those who bring the suits may incidentally be users in that they or their members have walked, watched and beheld the subject of the litigation. However, such use is often incidental to the larger purpose to protect the integrity of the environment.[2] And if the only persons with standing are users no one will have standing where there is no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to prevent the chemical poisoning of eagles).

Even where there are users, they will frequently be unwilling to sue. Nearby resident-users of a wilderness area may desire development because of the economic benefits which will result. National conservation organizations may be the only parties who will represent the national, as opposed to local, interest by opposing development. This conflict between local and national interests is particularly obvious

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[2]Two important examples other than the instant case are *Wilderness Society v. Hickel, supra* (the Alaska Pipeline case) and *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, D.W. Va., Civ. No. 70-82-E (involving use of a possible wilderness area).

and significant with regard to national parks, refuges, and forests which must be preserved even if local residents desire to develop them.

Furthermore, as the statute creating the National Park Service makes clear, one of the purposes for which these lands are reserved is "to conserve the scenery and the national and historic objects and the wild life therein . . . ." 16 U.S.C. 1. It follows that conservationists, as well as users, must have standing to protect the national interest in preserving the national parks. Analogous reasoning applies to national refuges and forests. See 16 U.S.C. 476, 694.

The plaintiff—the Sierra Club—and the four amici curiae—the Wilderness Society, Friends of the Earth, the Isaac Walton League, and the Environmental Defense Fund[3]—all have as their principal interest the protection and conservation of the environment. While the Sierra Club, Wilderness Society and the Isaac Walton League are also interested in appropriate uses of natural areas consistent with conservation of the environment, this is not their principal interest. They should not be required to assert this subsidiary interest in order to obtain standing to prevent despoilment of the environment. The other two organizations do not represent users at all and cannot assert standing on that basis.

Finally, Congress, in enacting the National Environment Policy Act, has recognized the standing of national conservation organizations to protect the environment. That Act declares that it is federal policy to use "all practical means and measures" to protect the environment in cooperation with "concerned . . . private organizations." 42 U.S.C. 4331 (a). Russell E. Train, the Chairman of the President's Council on Environmental Quality, which was created by the Act, has stated that (BNA Environment Reporter, 1970, p. 745):

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[3]The Environmental Defense Fund has filed a separate brief supporting the petition for a writ of certiorari.

> Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reenforcing government environmental protection programs.

The Council has itself specifically noted with approval the decisions in *Wilderness Society v. Hickel, supra,* and *Citizens Committee for the Hudson Valley v. Volpe, supra,* upholding the standing of national conservation organizations. BNA Environment Reporter, 1970, p. 746.

2. The Decision of the Court Below Allowing Use of Federal Parks, Forests and Refuge Lands for Uses Inconsistent with the Purposes for Which Congress Reserved Them Raises Issues of Major National Importance

The issues raised by this case on the merits involve actions by the Secretaries of Interior and Agriculture in permitting use of Sequoia National Refuge, Forest, and Park inconsistent with their purposes as specified by Congress.

Congress has provided that the Department of Interior shall regulate national parks to conform to the fundamental purpose . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. Congress has provided specifically with respect to Sequoia National Park that the Secretary of the Interior has the duty to establish regulations "for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." 16 U.S.C. 43. Sequoia National Game Refuge was established "to protect from trespass the public lands of the United States and the game animals which may be thereon" and permitted the Secretary of Agriculture only to allow uses within the Game Refuge

which "may be consistent with the purpose for which said game refuge is established." 16 U.S.C. 688.

The court below has in effect ignored the well established rule that Congress has plenary power under the Constitution concerning federal lands (Article IV, § 3, cl. 2) and that defendants have only the powers given them by Congress. *United States v. California,* 332 U.S. 19, 27; *Udall v. Shale Oil Corp.*, 406 F.2d 759, 764 (C.A. 10, 1969). The defendants have allowed major, permanent uses—a large resort, highway, and electric transmission line—to be built in a national park, refuge, and forest in conflict with both the purposes for which they have been reserved by Congress and specific statutory limitations.

a. First, Congress has authorized the Secretary of Agriculture to grant permits for constructing hotel or resorts in national forests only for 80 acres and for 30 years. 16 U.S.C. 497. Nevertheless, the Secretary has given a permit for 13,000 acres for the construction of ski lifts, sewage treatment facilities and parking structures as part of the development of a large resort. The court of appeals justifies this permit on the ground that the Secretary has traditionally exercised the broad power to issue revocable permits.

It is clear, however, that the admitted power of the executive to issue revocable permits cannot be allowed to circumvent Congressional limitations on the use of land in federal forests. The Secretary of Agriculture cannot be permitted to issue what are in fact long-term permits for extensive acreage in the guise that they are revocable. If the Secretary is allowed to issue such permits, the 80-acre limitation imposed by Congress will become virtually meaningless.

The revocable permit involved here is not truly revocable.[4] The ski lifts, sewage treatment plants, and parking facilities

[4] An opinion of the Attorney General in 1962 recognizes the difference between revocable and term permits by stating that a revocable permit is valid only if (1) the permit is expressly revocable at will; (2) the permitted structures are capable of being removed in case

cannot be removed and the use of bulldozers to create ski slopes will permanently damage the area. Plainly the permit is not revocable before the termination of the 30-year-permit since the developer is making a 35 million dollar investment contingent on the use of 13,000 not 80 acres.[5]

b. Congress has provided that the Secretary of Agriculture has authority to permit other uses of lands in the Sequoia National Game Refuge only "so far as they may be consistent with the purposes for which said game refuge is established." 16 U.S.C. 688. The refuge was established is protect scenically outstanding public lands and game animals and their habitat. *Ibid.* Personnel of the California Fish and Game Commission stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer" (R. 119). And the Secretary of Agriculture has neither made a finding nor could he make a finding that a large ski resort was compatible with the purpose of the refuge.

c. Defendants propose to allow the State of California to build a modern highway through Sequoia National Park purely to give access to the resort in Mineral King. This is a new modern highway which will have a different alignment than the present inadequate mountain road and will cause

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of revocation; (3) the permitted use will not permanently damage or destroy the land; and (4) the permitted use will be of direct benefit to the United States. 35 Op. Atty. Gen. 485. Similarly, Attorney General Stone concluded that a revocable patent license is only valid if "the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government." 34 Op. Atty. Gen. 320, 328.

[5]The Court below implicitly admitted both that the permit is not truly terminable "at will" and that the improvements cannot be removed by holding that a revocable permit can be issued regardless (Pet. App. 21).

extensive damage to the scenery and ecology of the park, including the Giant Sequoias, the great trees for which the park is named.

The Secretary of Interior has no authority to use land in a national park for a non-park purpose—to build a road to give access to a private resort outside the park. Such use is inconsistent with the responsibilities placed on the Secretary by Congress, both as to national parks generally and Sequoia in particular, to allow uses which preserve the scenery, the trees, the wildlife and the natural wonders.

d. Congress has provided that no permit for "transmission lines" will be issued in Sequoia National Park. 16 U. S.C. 45c. Without explanation, the court below held that this section was intended to apply only to hydroelectric projects and related facilities (Pet. App. 25). This decision is directly inconsistent with the plain words of the statute.

Two of these issues, those relating to revocable permits in national forests and the construction of highway across national parks for non-park purposes, are of major importance in their own right since they apply to national forests and parks throughout the country. Indeed, as the court below noted (Pet. App. 22), so-called revocable permits seem to be frequently employed to avoid the 80-acre limitation on the use of national forest land. While the other two issues involve statutes applying specifically to Sequoia National Game Refuse and Park, they too have broader significance. All four issues warrant review by this Court due to the importance of preserving national park, refuge, and forest lands for the Congressionally specified purposes for which they were created.

3. The Preservation of Sequoia National Refuge, Forest and Park Is of Such Importance as to Justify Review by this Court

This case involves the actions of defendants in allowing Walt Disney Productions to built a large resort in Mineral King Valley and allow construction of a highway and electric transmission line through Sequoia National Park. The Valley is in the Sierra Nevada Mountains of California and is surrounded on three sides by the National Park. While geographically and ecologically the Valley is part of the Park, Congress did not include the Valley in the Park because of the existence of mining claims. Congress did recognize its importance to the Park, however, by designating the Valley, which is part of Sequoia National Forest, as constituting, in addition, the Sequoia National Game Refuge. 16 U.S.C. 688.

If defendants and the developer are allowed to proceed, magnificent natural and scenic resources of this country will be irrevocably lost. Hotels, restaurants, parking, ski lifts, ski slopes and other recreational facilities will be spread over 13,000 acres of the Valley and nearby mountains. As many as 14,000 visitors will use the Valley daily, twice as many as now use Yosemite Valley on busy days. A major highway and transmission line will be cut across Sequoia National Park to Mineral King.

This Nation in the last few years has become increasingly concerned with the serious environmental dangers facing us, including the need to preserve the scenic and wildlife resources which are still left. Congress has recognized these dangers in several major pieces of legislation and particularly the National Environmental Policy Act. That Act, *inter alia*, places on the Federal Government the responsibility to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. 4331 (b)(4).

We submit that the proposed destruction of significant portions of the Sequoia National Game Refuge, Forest and Park is of such importance as itself to justify this Court in

granting the writ of certiorari. Even if the decision below were not in conflict with holdings of other federal courts of appeals and raised no major issues of continuing importance in future environmental litigation, the subject matter of this case requires review by this Court.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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November, 1970

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[6]While the opinion of the court of appeals is not entirely clear, it appears that the district court on remand will be obliged to dismiss the complaint because, in the view of the court below, the plaintiff both lacked standing and failed to state a cause of action. However, even if plaintiff is permitted to amend the complaint to improve its position with regard to standing (by alleging and showing that it has members who use the Sequoia National Refuge, Forest and Park) and to offer further evidence on the substantive issues, the court of appeals did deny the preliminary injunction. If plaintiff is allowed to continue the litigation, irreparable damage will still occur as the developer starts work in the Valley to build the resort and the State of California begins to construct the highway across Sequoia National Park. It is therefore essential for this Court, in order to prevent this damage, to grant the writ and either (a) hear the cause on the merits or (b) continue the present injunction until plaintiff has had the opportunity to amend its complaint in the district court and has received a full hearing on its prayer for a permanent injunction.